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Timothy A. Tabor, Debra J. Tabor, and Farmers Insurance Company v. The Metal Ware Corporation : Reply Brief

Utah Court of Appeals

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IN THE SUPREME COURT OF THE STATE OF UTAH

TIMOTHY A. TABOR, DEBRA J.
TABOR, and FARMERS
INSURANCE COMPANY,

Petitioners/Appellants,

vs.

THE METAL WARE
CORPORATION,

Respondents/Appellees.

Supreme Court No.: 20060504-SC

Tenth Circuit Court of Appeal Nos.:
05-4155 and 05-4156

REPLY BRIEF OF APPELLANTS TIMOTHY A. AND DEBRA J. TABOR

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ARGUMENT

I. SUCCESSOR LIABILITY

- a. IF THIS COURT FOLLOWS ITS REASONING FOR ADOPTING PRODUCTS LIABILITY AS AN OFFICIAL REMEDY IN UTAH, THE COURT SHOULD FOLLOW ITS PRIOR REASONING AND ADOPT THE PRODUCT LINE AND CONTINUITY OF ENTERPRISES DOCTRINE TO PROTECT INNOCENT UTAH PURCHASERS**

In its Appellant Brief, Metal Ware Corporation (hereinafter “Metal Ware”) argues against the expansion of the four traditional exceptions to the general rule of nonliability. Metal Ware argues against the expansion because “the imposition of strict liability on [asset purchase] successor corporations is inconsistent with the principle of products liability law that imposes responsibility on the party who created the risk and was in a position to prevent its occurrence.” (Metal Ware Appellant Brief, Page 24).

Applying the principles first espoused by Utah courts in applying the rules of products liability to corporations in Utah, however, provides a basis for extending the four traditional exceptions to the general rule of non-liability to include the ‘product line’ doctrine and the ‘continuity of enterprise’ doctrine. *See, Ernest W. Hahn, Inc. v. Armco Steel Co.*, 601 P.2d 152 (Utah 1979).

In Haun, the Utah Supreme Court addressed the long history of products liability law in the United States and in Utah. The Court recognized that an injured party should have a remedy “ ‘... to insure that the costs of injuries resulting from

defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.’ ” Ernest W. Hahn, Inc., 601 P.2d at 156, *quoting*, Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 27 Cal. Rptr. 697, 377 P.2d 897, 901 (1962).

The Court further articulated its reasoning for adopting products liability in Restatement (Second) of Torts § 402A and provided the following explanation as to why they adopted the strict products liability doctrine:

... we fastened strict liability on a manufacturer who placed on the market a defective product even though both privity and notice of breach of warranty were lacking. We rejected both contract and warranty theories, express or implied, as the basis for liability. Strict liability, we said, did not rest on a consensual foundation but, rather, *on one created by law*. The liability was created judicially because of the economic and social need for the protection of consumers in an increasingly complex and mechanized society, and because of the limitations in the negligence and warranty remedies. *Our avowed purpose was "to insure that the costs of injuries resulting from defective products are born by the manufacturer that put such products on the market rather than by the injured persons who are powerless to protect themselves."* Subsequently, the Greenman principle was incorporated in section 402A of the Restatement Second of Torts, and adopted by a majority of American jurisdictions.

Hahn, 601 P.2d at 157 (emphasis added), *quoting*, Daly v. General Motors Corp., 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162, 1165-1166 (1978).

Metal Ware alleges in its brief that the legislature is the more appropriate forum in which to articulate any change to the products liability law and exceptions to the general rule of non-liability for successor corporations. (*See*, Metal Ware Appellant Brief, Page 25). This contention, however, flies in the face of the fact

that the entire products liability doctrine was judicially created as noted in the Haun case wherein Utah adopted the judicially created strict products liability doctrine. To say that Utah courts should adopt one judicially created theory of recovery (products liability) and deny other judicially created theories of recovery (product line and continuity of enterprises), despite the fact the purpose of both is to protect the public, is entirely insensitive to this State's history with respect to products liability, its creation and its adoption in Utah.

If this Court is to look to the roots of products liability in Utah and the reasons originally espoused for adopting products liability to begin with, this Court should follow its original reasoning and adopt the limited expansion of successor liability in the instant case. Again, the Haun court adopted products liability in Utah based upon the judicial creation of the same and provided the following purpose behind said adoption: *“to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”* Ernest W. Hahn, Inc., 601 P.2d at 156 (emphasis added) (quotations omitted).

Other courts embraced this simple tenet and expanded the four generally accepted rules of successor liability to facilitate the purpose of strict products liability which *“is to assure that a responsible source is available to compensate*

the injured party.” James Hart v. Bruno Machinery Corp., 250 A.D.2d 58, 61 (N.Y. App. Div. 3d 1998) (emphasis added). The New Jersey Supreme Court indicated that they recognized the product line exception in an attempt to give effect to the social policies underlying products liability law. Ramirez v. Amsted Indust., 431 A.2d 811, 824-825 (N.J. 1981).

The Court in Ramirez offered its justification for its imposition of potential liability upon a successor corporation that acquires the assets and continues the manufacturing operation of the predecessor:

(1) The virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading role, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business. [19 Cal.3d at 31, 560 P.2d at 9, 136 Cal.Rptr. at 580.]

Ramirez, 431 A.2d at 820.

If this Court is to follow its original rationale for adopting strict products liability in Utah at a time when many states had not done so, this Court should adopt the additional exceptions at issue in the instant appeal. The protection of the consumer is a paramount concern both at the time of Haun when products liability was adopted and now when this Court has an opportunity to provide further protection to the innocent public. The public is not in the best position to insure against the loss caused by a defective product, but the successor corporation is in

the best position to alleviate the costs of loss, to insure against the loss, and to control its future by contracting with the selling party for the assets of the selling party.

In the instant case, Metal Ware was in the best position to insure against future loss because it already knew of the defective food dehydrator and presumably addressed the issue in the purchasing price for American Harvest. Metal Ware alludes to having to pay twice for the assets of the selling corporation as a deterrence to the adoption of the products line and continuity of enterprises doctrine when it provides that

... the successor corporation has already negotiated and paid for the goodwill or reputation of the predecessor's product line, and to hold the successor liable for defects in products manufactured by the predecessor would be forcing the successor to pay twice for the goodwill of the predecessor. (Metal Ware Appellant Brief, Page 27).

This assumes, of course, the successor corporation is unaware of the lawsuits pending against the seller corporation and pays full price for the assets, which is not the case in the instant case.

As noted in the Tabors' Appellant Brief, there is ample evidence to show that Metal Ware wanted to make American Harvest a wholly owned subsidiary (Tabors' Fed. App., Page 421) and when it found out about the potential for products liability lawsuits against American Harvest, Metal Ware structured its deal with American Harvest as an asset purchase to avoid the liability and

presumably reduced its purchase price to reflect this type of instability. Metal Ware already has had the benefit of its bargain and cannot now argue that it would have to pay twice when it received the benefit of a reduced sales price as a result of the pending lawsuits.

Metal Ware's contractual acknowledgement of the products liability risks involved with the Asset Purchase Agreement (Tabors' Fed. App., Pages 424-446) was detailed in the Agreement itself. The Agreement provides the following:

Purchaser shall not assume or become liable for any contracts, obligations or liabilities of Seller ... and Seller shall indemnify and hold Purchaser harmless from any liability arising out of any of such contracts, obligations, or liabilities: provided, however, that Purchaser hereby assumes all defense costs and liabilities arising subsequent to the Closing of the litigation known as Douglas E. Dempsey v. American Harvest. (Tabors' Fed. App., Pages 430).

Metal Ware received the benefit of its knowledge and its bargain for the assets of American Harvest. To say now they are an innocent party to all of the events in this case is belied by the testimony previously presented in the Tabors' Appellant Brief. Metal Ware desired to purchase American Harvest, discovered the problems with the product liability, restructured the deal to avoid liability and to take all of the assets and leaving only the shell of a corporation behind without a remedy to the parties negatively affected by the defective product.

Metal Ware's contract with American Harvest is a complex business deal entered into to avoid paying any claims to those who might have been injured by

the known defective product. To say the innocent purchasers and injured parties are better able to bear this cost is not based upon reality. The complexity of the business deal and the business acumen of the persons involved in the sale and acquisition of American Harvest points to the sophistication the innocent purchasers of a defective product encounter when purchasing a product in Utah's stream of commerce. In order to insure that Utah consumers are protected against the hawkish business practices evident in the instant case is sound public policy in favor of Utah consumers.

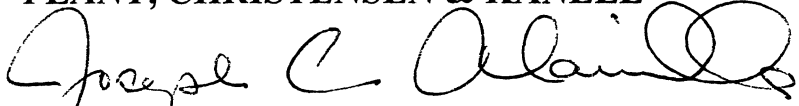
Revisiting the reason the Utah Supreme Court adopted strict products liability to begin with, it is apparent it was created and adopted as a result of limitations hindering the innocent end users from suing the manufacturer. As a result, the doctrine of strict products liability was adopted. In the instant case, the Tabors believe it is appropriate, given the original rationale for adopting strict liability, to adopt the 'products line' doctrine and the 'continuity of enterprise' doctrine. If the public policy concerns originally cited in adopting strict products liability in the State are followed in the instant case, this Court should extend the judicially created doctrine of strict products liability to include the 'products line' and 'continuity of enterprises' doctrine.

CONCLUSION

Based upon the foregoing, the Tabors respectfully request this Court adopt the 'continuity of enterprise doctrine' and/or the 'product line' doctrine in order to protect Utah consumers and to give Utah consumers an avenue for recourse for damages suffered as a result of a manufacturer or successor corporation placing defective product into the Utah stream of commerce.

DATED THIS 1 day of November, 2006.

PLANT, CHRISTENSEN & KANELL

A handwritten signature in black ink, appearing to read 'Theodore E. Kanell', written over the printed name.

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CERTIFICATE OF SERVICE


I hereby certify that on the ___/___ day of November, 2006, a true and correct copy of the Reply Brief of Appellants Timothy and Debra Tabor was served, postage prepaid, via first class mail on the following:

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ADDENDUM

Pursuant to Utah Rules of Appellate Procedure Rule 24(a)(11)(A)-(C), the Tabors represent that the Utah Supreme Court already is in possession of Farmers' Federal Appendix and the Tabors' Federal Appendix, which are bound and contain all of the pertinent documents to the Tabors' arguments as well as a table of contents. The Tabors hereby certify that no additional addenda are necessary and no additional documents need be attached as an addendum to this Brief.